

CHAPTER FOUR. — ANTITRUST

Parens Patriae Suits by State Attorney Generals: An Effective Antitrust Remedy for Small Business

Small businesses, on the whole, lack sufficient financial resources to litigate antitrust claims. This comment suggests state attorney general parens patriae suits on behalf of injured small businesses as an alternative method of redress.

Federal antitrust law violations¹ have a greater impact on small business² than on other groups in society.³ Small busi-

¹ Violations of the federal antitrust laws include price-fixing conspiracies, manufacturer product tie-ins, monopolization, group boycotts, anticompetitive mergers, resale price maintenance, and various other forms of anticompetitive conduct. *See generally* P. AREEDA & D. TURNER, *ANTITRUST LAW* (1978); L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* (1977). The antitrust statutory provisions, however, are phrased in terms of general anticompetitive conduct. *See* notes 12-19 and accompanying text *infra*.

² For purposes of this comment, a small business is a business entity as defined in the Small Business Administration's (SBA) small business size guidelines. This comment adopts the SBA definition of a small business for purposes of small business investment company assistance.

A small business concern . . . is one which: (a) Together with its affiliates, is independently owned and operated, is not dominant in its field of operation, does not have net worth in excess of \$6 million, and does not have an average net income, after Federal income taxes, for the preceeding 2 years in excess of \$2 million (average net income to be computed without benefit of any carryover loss); or (b) Qualifies as a small business concern under § 121.3-10. 13 C.F.R. § 121.3-11 (1980). The regulations in 13 C.F.R. § 121.3-10 (1980) set down size standards for recipients of SBA loans.

nesses are often forced to absorb the cost of antitrust violations, since they lack the resources to litigate their claims⁴ and to extract settlements from antitrust defendants.⁵ Small business' inability to remedy antitrust violations can also result in higher prices for both small businesses and consumers, restricted competition, and the eventual departure of smaller firms from the marketplace.⁶ This harsh result is inconsistent with the procompetitive goals of the antitrust laws.⁷ Therefore, an alternative must be found to the traditional enforcement mechanisms, which force the private litigant to fend for itself against antitrust law violators.

Parens patriae suits⁸ brought by state attorney generals on behalf of injured small businesses are a possible alternative. Several states recognize the efficacy of parens patriae suits by including small businesses in antitrust parens patriae litigation for *injunctive relief*.⁹ Unfortunately, federal statutory provisions preempt state efforts to include small business interests in parens patriae suits for *damages*. Congress authorized parens patriae suits for treble damages in the 1976 Hart-Scott-Rodino

This net worth/net income based definition may soon become obsolete for purposes of the SBA. The SBA has recently proposed a revision of all of its small business size standards. 45 Fed. Reg. 15,442 (1980). The new definitions would be based solely on the average number of full and part time employees over a 12 month period. While the standards would not vary with the type of SBA program involved, they would vary with the particular industry involved.

³ Antitrust violations impact other groups in society besides small business. But these other groups, for example consumers and large companies, either have special procedural devices to aid them in redress of antitrust injuries, *e.g.*, the Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c-15h (1976) (parens patriae suits on behalf of consumers), or possess sufficient financial resources to strike back at antitrust violations.

⁴ See notes 39-58 and accompanying text *infra*.

⁵ See generally Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CALIF. L. REV. 1264, 1280 (1977).

⁶ See notes 64-72 and accompanying text *infra*.

⁷ See notes 67-74 and accompanying text *infra*.

⁸ Literally translated as "parent of the country," BLACK'S LAW DICTIONARY 1003 (5th ed. 1979), parens patriae originally developed as part of the King's royal prerogative to act on behalf of infants and mental incompetents and as superintendent of all charitable uses. See Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U.L. REV. 193, 197-202 (1970); Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DE PAUL L. REV. 895, 896-907 (1976).

⁹ See notes 118-55 and accompanying text *infra*.

Antitrust Improvements Act,¹⁰ but only on behalf of consumers.¹¹ Congressional failure to include small business within the coverage of the Act left a tremendous gap, since small businesses encounter many of the same problems faced by consumers in seeking antitrust recovery.

This comment analyzes parens patriae suits by state attorney generals on behalf of small businesses injured by violations of the federal antitrust laws. The need for small business inclusion in parens patriae suits is the focal point for the initial inquiry. Next, parens patriae as an alternative to existing methods of private enforcement is analyzed. This is followed by a discussion of the two broad classes of parens patriae suits; those for injunctive relief and those for treble damages. Recent cases indicate that authority for the former currently exists. Authority for the latter, however, will require an amendment of the 1976 Antitrust Improvements Act.

I. INADEQUACIES OF TRADITIONAL PUBLIC AND PRIVATE ENFORCEMENT MECHANISMS

Federal antitrust laws are enforced through a variety of public and private tools. None of these enforcement mechanisms, however, adequately remedy most antitrust injuries suffered by small business. Government actions achieve a direct benefit for small business in few cases. Private actions for damages or injunctive relief place the burden of litigation on the small business. Since many small businesses cannot meet that burden, the result is inefficient enforcement of the antitrust laws.

The federal antitrust statutory provisions, while broad in scope, are few in number. The basic statute is the Sherman Act,¹² which deals primarily¹³ with restraints of trade¹⁴ and mo-

¹⁰ Pub. L. No. 94-435, §§ 301-304, 90 Stat. 1383 (1976) (codified at 15 U.S.C. §§ 15c-15h (1976), 28 U.S.C. § 1407(h) (1976)). Prior to the passage of the Antitrust Improvements Act, states had no authority to sue as parens patriae for treble damages on behalf of any type of beneficiary. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973).

¹¹ Congress felt consumers were the class most in need of parens patriae relief. Congress also thought inclusion of any type of business entity in the beneficiary class would overly complicate the litigation and create res judicata problems. See notes 169-210 and accompanying text *infra*.

¹² 15 U.S.C. §§ 1-7 (1976).

¹³ In addition to outlawing certain restraints of trade and monopolization,

nopolization.¹⁵ To supplement the Sherman Act, Congress enacted the Clayton Act¹⁶ and the Federal Trade Commission Act¹⁷ in 1914. The Clayton Act lays out specific anticompetitive offenses¹⁸ in more detail than the Sherman Act¹⁹ and establishes private enforcement mechanisms²⁰ for both Sherman Act and Clayton Act violations.²¹ The Federal Trade Commission Act established the Federal Trade Commission (FTC),²² with jurisdiction to enforce many of the provisions in the other substantive antitrust statutes.²³ Moreover, Congress has from time to time

the Sherman Act forbids restraints of trade in the District of Columbia and United States territories. *Id.* § 3. The Act also establishes the jurisdiction of the federal courts to hear, and of the government to bring, antitrust actions. *Id.* § 4. The remaining sections of the Act deal with procedural and definitional matters.

¹⁴ Section 1 of the Act provides that “[e]very contract, combination . . . , or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal” *Id.* § 1. Violation of this section is a felony. *Id.*

¹⁵ Section 2 of the Act provides that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony” *Id.* § 2.

¹⁶ *Id.* §§ 12-27 (original version at ch. 323, 38 Stat. 730 (1914)).

¹⁷ 15 U.S.C. §§ 41-58 (1976) (original version at ch. 311, 38 Stat. 717 (1914)).

¹⁸ *E.g.*, as amended by the Robinson-Patman Price Discrimination Act, ch. 592, § 1, 49 Stat. 1526 (1936), § 2 of the Clayton Act declares certain types of price discrimination to be illegal. 15 U.S.C. § 13 (1976). Another provision, § 7, prohibits certain corporate mergers. *Id.* § 18 (as amended by the Celler-Kefauver Act of 1950, ch. 1184, 64 Stat. 1125). Finally, § 3 prohibits certain types of tying arrangements. 15 U.S.C. § 14 (1976).

¹⁹ In comparison to the Clayton Act, Sherman Act §§ 1 and 2 offer very little guidance as to the particular types of activity covered by their prohibitions. The Sherman Act’s vagueness is intentional, designed to give the courts broad leeway in establishing standards and methods of analysis. *See Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933); L. SULLIVAN, *supra* note 1, § 3, at 14.

²⁰ *See* notes 31 & 32 *infra*.

²¹ Enforcement of the Federal Trade Commission Act, however, is limited to the FTC, *see* 15 U.S.C. § 70e (1976), as the courts have denied a private right of action for violation of the Act. *See, e.g., Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973).

²² 15 U.S.C. § 41 (1976).

²³ Section 11 of the Clayton Act authorizes FTC enforcement of §§ 2, 3, 7, and 8 of the Clayton Act. 15 U.S.C. § 21(a) (1976). In addition, § 5 of the Federal Trade Commission Act declares that unfair methods of competition

enacted amendments²⁴ and additions²⁵ to these acts to supplement the basic statutory structure.

Both public and private mechanisms serve to enforce the provisions of the various antitrust laws. The Department of Justice and the FTC conduct public law enforcement. The Justice Department has the power to enforce the Sherman Act through criminal²⁶ and civil proceedings.²⁷ In addition, both the Justice

are unlawful. *Id.* § 45(a)(1).

²⁴ The major amendments of the antitrust laws include the Robinson-Patman Price Discrimination Act, ch. 592, § 1, 49 Stat. 1526 (1936) (amending 15 U.S.C. § 13 (1976)); the Cellar-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (amending 15 U.S.C. § 18 (1976)); Act of July 7, 1955, ch. 283, § 2, 69 Stat. 282 (amending 15 U.S.C. § 16(a) (1976)); the Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706 (1974) (amending 15 U.S.C. §§ 1-3 (1976)); and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, §§ 101-106, 90 Stat. 1383 (amending 15 U.S.C. §§ 1311-1314 (1976)).

²⁵ Some important additions to the antitrust arsenal include the Robinson-Patman Price Discrimination Act, ch. 592, §§ 2-4, 49 Stat. 1526 (1936) (codified at 15 U.S.C. §§ 13a-13b, 21a (1976)); the Act of July 7, 1955, ch. 283, § 1, 69 Stat. 282 (codified at 15 U.S.C. §§ 15a-15b (1976)); and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, §§ 201-304, 90 Stat. 1383 (codified at 15 U.S.C. §§ 15c-15h, 18a (1976), 28 U.S.C. § 1407(h) (1976)).

²⁶ Violation of §§ 1-3 of the Sherman Act, 15 U.S.C. §§ 1-3 (1976), is a felony. Corporate violators may be fined up to \$1 million, while other violators may receive a combination of \$100,000 in fines and 3 years imprisonment. The Justice Department normally uses criminal enforcement only where there has been a clear violation of the law. Sims, *Antitrust Sentences-A Prosecutor's View*, 47 ANTITRUST L.J. 693, 703 (1978). Although it appeared that antitrust criminal prosecutions would dramatically increase with the greater penalties provided by the Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706 (1974) (violation increased from misdemeanor to felony; maximum penalties increased from \$50,000, and one year imprisonment for non-corporate violators, to \$1 million for corporate violators and \$100,000 and 3 years imprisonment for non-corporate violators), 861 ANTITRUST & TRADE REG. REP. (BNA) A-9 (Apr. 27, 1978), Justice Department statistics indicate criminal prosecutions have declined in recent years. 949 ANTITRUST & TRADE REG. REP. (BNA) A-28, F-3 (Jan. 31, 1980).

²⁷ Section 4 of the Sherman Act authorizes the Justice Department to institute equitable proceedings to prevent and restrain any Sherman Act violation. 15 U.S.C. § 4 (1976). The majority of these government civil actions end in settlement, referred to as consent decrees. In 1978-79, 82% of the government's civil antitrust cases ended in consent decrees. DIRECTOR ADMIN. OFFICE U.S. COURTS ANN. REP. Table C-4 (1979) [hereinafter cited as DIRECTOR'S ANN. REP.]. See generally Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365 (1970).

Department²⁸ and the FTC²⁹ have the power to enforce the Clayton Act through civil proceedings. Private enforcement tools³⁰ include the treble damage action, authorized by section 4 of the Clayton Act,³¹ and suits for injunctive relief, provided for by section 16 of that Act.³²

Public actions, essential to the overall scheme of antitrust enforcement, are an unsatisfactory method of redressing small business injuries. Federal government resources are limited,³³ so the Justice Department and the FTC can only aid injured small business in a few cases.³⁴ When the government sues, illegal conduct may be enjoined or affirmative action ordered. Nonetheless, the suit will not compensate injured small businesses for their dam-

²⁸ Section 15 of the Clayton Act authorizes the Justice Department to institute equitable proceedings to prevent and restrain any violation of the Clayton Act. 15 U.S.C. § 25 (1976).

²⁹ See note 23 *supra*.

³⁰ When the federal government sues in a proprietary role for damages sustained by an antitrust violation, it is considered a private plaintiff. Unlike all other private plaintiffs the federal government can recover only actual damages, not treble damages. 15 U.S.C. § 15a (1976).

³¹ Section 4 of the Clayton Act provides that “[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . , and shall recover threefold the damages by him sustained, . . .” *Id.* § 15.

³² Section 16 of the Clayton Act provides that “[a]ny person, firm, corporation, or association shall be intitled to sue for and have injunctive relief, . . . against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity . . .” *Id.* § 26. In addition, a private plaintiff may secure preliminary equitable relief upon execution of a bond and a showing that irreparable loss or damage is immediate. *Id.*

³³ The Justice Department’s Antitrust Division operates on an appropriation of approximately \$50 million per year. 949 ANTITRUST & TRADE REG. REP. (BNA) A-8 (Jan. 31, 1980). The FTC operates on a budget of approximately \$70 million per year. *Id.* While these amounts may seem substantial, when viewed in light of inflation they are less than in previous years. *Id.*

³⁴ Justice Department and FTC figures, while not broken down to reflect cases involving small businesses, are indicative of the few number of cases brought by the federal government. In 1979, the Department’s Antitrust Division filed 31 civil cases and 27 criminal cases. 949 ANTITRUST & TRADE REG. REP. (BNA) F-2 (Jan. 31, 1980). In fiscal year 1979, the FTC resolved a total of 54 complaints involving antitrust law violators. 933 ANTITRUST & TRADE REG. REP. (BNA) A-6 (Oct. 4, 1979). In comparison, in the 12 month period ending in June, 1979, 1,234 private antitrust suits were filed. DIRECTOR’S ANN. REP., *supra* note 27, at Table C-2.

ages.³⁵ If the government sues and wins, the Clayton Act allows a private plaintiff in subsequent litigation to use the government's victory as prima facie evidence of a violation.³⁶ This provision is weakened, however, by limits on the type of government actions it encompasses.³⁷ Moreover, since government suits are few in number,³⁸ the provision is of little help in most situations. Thus, while public enforcement can deter illegal conduct in those few instances where the government acts, it is not a viable alternative for redressing small business injuries.

Traditional private enforcement mechanisms are also unable to aid injured small businesses effectively. A small business faces formidable barriers when it seeks recovery for an antitrust injury. These barriers may be so onerous that litigation is untenable. So long as the injured small business bears the burden of litigating the antitrust claim, the likelihood of such litigation will remain remote.

One such barrier to bringing an antitrust suit is the likelihood that litigation will disrupt any business relations with the defendant.³⁹ This problem is especially serious if the violator provides a scarce good or service which is essential to the small business. Commencement of the action may irreparably damage that relationship and financially harm the small business.

³⁵ The federal government can sue for actual damages when it is injured in its proprietary capacity by an antitrust violation. 15 U.S.C. § 15a (1976). When the government sues in its governmental capacity, however, it is limited to equitable relief, *e.g.*, *id.* § 4, or criminal penalties. *E.g.*, *id.* § 1. Individuals injured by the particular violation do not receive any damages as a result of the government's suit.

³⁶ Section 5(a) of the Clayton Act, *id.* § 16(a), provides that a final judgment or decree, in a government civil or criminal case, that a defendant has violated the antitrust laws is prima facie evidence against that defendant in a subsequent private treble damage action.

³⁷ Section 5(a) of the Clayton Act, *id.*, does not provide for prima facie effect of a judgment or decree entered before testimony is taken or entered in damage actions by the United States under Clayton Act § 4a. *Id.* § 15a. Thus most consent decrees in civil cases and nolo contendere pleas in criminal cases are not given prima facie effect.

³⁸ See note 34 *supra*.

³⁹ Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1590 (1969); Wheeler, *Antitrust Treble Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319, 1330 (1973). See also *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979) (discussing franchisee's decision not to name its franchisor as a Sherman Act § 2 co-defendant).

The cost of litigating an antitrust case is another hurdle for the potential plaintiff. Antitrust suits are very expensive.⁴⁰ In addition to the usual expenses, such as filing fees, court costs, witness fees and expenses, and attorneys' fees,⁴¹ an antitrust plaintiff may face additional costs peculiar to complex litigation. For example, the various discovery costs are often much greater in antitrust suits than in other less complex types of litigation.⁴² The difficulty in proving an antitrust violation can also add to the plaintiff's costs.⁴³ Moreover, if the plaintiff brings a class ac-

⁴⁰ For one example of extreme costs in an antitrust action see *SCM Corp. v. Xerox Corp.*, 463 F. Supp. 983 (D. Conn. 1978), *remanded*, 599 F.2d 32 (2d Cir. 1979). Although this case does not involve small businesses, SCM is an excellent example of expensive antitrust litigation. Conservative estimates are that the combined legal costs to both parties during the trial amounted to \$50,000 per day. Green, Marks & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 LOY. L.A.L. REV. 493, 499 (1978). The trial lasted a total of 219½ days. 463 F. Supp. at 986. See generally NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND ATTORNEY GENERAL 11-14 (1979) [hereinafter cited as NAT'L COMM'N REP.]; Olson, *Controlling Litigation Costs: Some Proposals for Reform*, LITIGATION, Summer 1976, at 16; Wheeler, *supra* note 39.

⁴¹ See Note, *Discovery of Plaintiff's Financial Situation in Federal Class Actions: Heading 'em Off at the Passbook*, 30 HASTINGS L.J. 449, 451 (1978). Under FED. R. CIV. P. 54 the prevailing party in the litigation is awarded costs as a matter of course. In addition, the Clayton Act authorizes payment of a reasonable attorney's fee to a prevailing plaintiff in either a treble damage suit, 15 U.S.C. § 15 (1976), or an action for injunctive relief. *Id.* § 26.

⁴² Green, Marks & Olson *supra* note 40, at 498; Halverson, *Coping With the Fruits of Discovery in the Complex Case-The Systems Approach to Litigation Support*, 44 ANTITRUST L.J. 39 (1975). Halverson estimates that in a moderately sized antitrust case with approximately 10,000 documents and 5,000 pages of transcripts, discovery costs can run the client about \$300,000. *Id.* at n.2.

⁴³ The rejection of "conscious parallelism" as a means of proving concerted action under § 1 of the Sherman Act is one example of the difficult proof problems faced by an antitrust plaintiff. Section 1 requires a "contract, combination . . . or conspiracy" before a particular restraint of trade is considered illegal. 15 U.S.C. § 1 (1976). The courts have consistently held the duality requirement of § 1 is not satisfied by mere independent, albeit similar, anticompetitive conduct between defendants, *i.e.*, "conscious parallelism." *Theatre Enterprises, Inc. v. Paramount Film Distr. Corp.*, 346 U.S. 537 (1954); *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963). See generally Posner, *supra* note 38; Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962). The plaintiff's litigation costs will increase as it is required to prove more facts than mere

tion, the cost of identifying⁴⁴ and notifying⁴⁵ the class members can increase the plaintiff's burden.

Another obstacle confronting a small business is the fact that final disposition of an antitrust action can take years.⁴⁶ Antitrust actions that settle before trial take an average of 13 months.⁴⁷ If the matter goes to trial, however, resolution of the suit takes an average of 33 months.⁴⁸ In either case, an antitrust action is very time consuming⁴⁹ and requires the close attention and time of

similarity of conduct.

Another proof related issue which can increase a plaintiff's litigation cost is the use of a Rule of Reason analysis in antitrust cases. Courts have traditionally characterized particular conduct as either illegal per se or illegal under a Rule of Reason analysis. The Rule of Reason requires more than proof of restraint of trade; it also requires proof that a particular restraint is unreasonable. *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918). See generally Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (pts. 1 & 2)*, 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966). The necessity of proving the unreasonableness of a restraint of trade makes it extremely difficult for a plaintiff to prove a violation. Professor Posner has characterized the Rule of Reason as "little more than a euphemism for nonliability." Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977). As courts increase their use of the Rule of Reason, e.g., *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the increased proof burden and the resulting increased costs will become a greater disincentive for a potential plaintiff to sue.

⁴⁴ Identification of class members is an underlying cost of notice which must be borne by the plaintiff. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).

⁴⁵ In class action litigation, under FED. R. CIV. P. 23(b)(3), the plaintiff must pay the costs of notifying class members of the litigation. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). A prevailing plaintiff's burden, however, may be reduced when its attorneys' fees and costs are assessed against the total class recovery. *Boeing Co. v. Van Gemert*, 100 S. Ct. 745 (1980).

⁴⁶ See NAT'L COMM'N REP., *supra* note 40, at 11-14.

⁴⁷ DIRECTOR'S ANN. REP., *supra* note 27, at Table C-5a. In 1978-79, over 90% of the private antitrust actions terminated were settled before trial. *Id.* Forty-three percent of these pre-trial terminations were out of court settlements. *Id.* at Table C-4.

⁴⁸ *Id.* at Table C-5a. For the year ending in June 1979, approximately 9% of the private antitrust actions terminated reached trial. *Id.* at Table C-4.

⁴⁹ A recent study conducted for the Justice Department estimated that an average antitrust class action required between 4,000 and 5,000 hours of attorneys' time. ARTHUR YOUNG & CO., RESOURCE REQUIREMENTS IN DEPARTMENT OF JUSTICE OF PROPOSED PUBLIC ACTION 7 (prepared for the U.S. Dep't of Justice) (on file at U.C. DAVIS L. REV.) [hereinafter cited as RESOURCE REQUIREMENTS]. Of course, there are extreme examples. It is estimated that over 60,000 hours of attorneys' time was spent on Berkey Photo's monopolization suit against Ko-

the small business. Antitrust litigation requires the small business's management to spend a great deal of time responding to the opponent's discovery requests, preparing for and participating in the trial.⁵⁰ In addition, the protracted length of the suit will add greatly to its expense.⁵¹

If after weighing these factors,⁵² the small business plaintiff still desires to sue, the plaintiff must choose between an individual action⁵³ and a class action.⁵⁴ A small business will rarely bring an individual suit. The costs of the action are too prohibitive, in light of the potential recovery, to justify litigation.⁵⁵ The class action alternative can also be unappealing to the small business plaintiff. A class action does not relieve the plaintiff of the burdensome costs which often serve to deter an individual action.⁵⁶ In addition to the usual costs incurred by a plaintiff in an

dak. *Restoring Effective Enforcement of the Anti-Trust Laws: Hearings on H.R. 2060 and H.R. 2204 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess.* 195 (1979) (statement of Alvin M. Stein).

⁵⁰ See Green, Marks & Olson, *supra* note 40, at 499.

⁵¹ Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 92 (1976).

⁵² There are various other factors which will influence the private litigant's decision. Potential recovery may be de minimis, thus providing little incentive to sue. The small business plaintiff may have a general antipathy for the anti-trust laws. This could be based on hostility towards government intrusion into the marketplace or it could stem from psychological association with antitrust defendants in general. See generally Wheeler, *supra* note 39, at 1329-32.

⁵³ See notes 31 & 32 *supra*.

⁵⁴ Class actions in the federal courts are authorized under FED. R. CIV. P. 23. Subdivision (a) of that rule requires the satisfaction of four prerequisites for institution of class action litigation: impracticability of joinder, common questions of law or fact, typical claims or defenses, and fair and adequate representation by the named plaintiff. Having satisfied the prerequisites of subdivision (a), three types of class action are available under subdivision (b). Antitrust class actions of the type discussed in this comment will most often fall under subdivision (b)(3). See Comment, *Antitrust and the Consumer Interest: Can Section 4 of the Clayton Act Survive the Current Supreme Court?* 27 CATH. U.L. REV. 81, 97 (1977). The court in a (b)(3) action must find that common questions of law or fact predominate over questions affecting individual members, and that a class action is superior to other methods of adjudication.

⁵⁵ See notes 39-51 and accompanying text *supra*.

⁵⁶ FED. R. CIV. P. 23 (b)(3) was designed to achieve that goal. The Advisory Committee felt economies of time, effort, and expense would be achieved by institution of a class action as opposed to institution of an individual action. Advisory Committee's Notes, 39 F.R.D. 69, 102-03 (1966). As the cost data in

individual action, a class action plaintiff faces the expense of certification, identification, notification, and administration of the class suit. The plaintiff can attempt to spread these costs among the class members, but the plaintiff cannot force them to pay.⁵⁷ With the imposition of these additional costs, class action litigation becomes extremely expensive;⁵⁸ in some cases more expensive than an individual action.

Neither private enforcement alternative serves small business needs. Small business needs a low cost method of recovery when injured by an antitrust violation. Without a means of lowering litigation costs or shifting these costs to some other party, small

note 58, *infra*, indicates, class actions are not an inexpensive alternative. Arguably, costs in those actions would have been greater had they been individual actions. This is unlikely, however, given the additional litigation costs faced by a class representative.

⁵⁷ See *Lamb v. United Security Life Co.*, 59 F.R.D. 25, 39 (S.D. Iowa 1972). Once the plaintiff class recovers damages, however, the class representative's costs and attorneys' fees can be assessed pro rata against the claimed and unclaimed portions of the recovery fund. *Boeing Co. v. Van Gemert*, 100 S. Ct. 745 (1980).

⁵⁸ Table I (below) provides examples of litigation costs and attorneys' fees in antitrust class actions involving small business plaintiffs. The data are derived from Developments, *Attorney Fee Awards in Antitrust Class Actions*, 5 CLASS ACT. REP. 331 (1978) and ARTHUR YOUNG & Co., SMALL BUSINESS REPRESENTATION IN FEDERAL ANTITRUST CLASS ACTIONS (prepared for the U.S. Dep't of Justice) (Apr. 19, 1979) (on file at U.C. DAVIS L. REV.) [hereinafter cited as SMALL BUSINESS REPRESENTATION]. The definition of small business used in deriving the data in Table I (less than 100 employees and/or less than \$5 million in revenues, *id.*, at 1) is different from the definition used in this comment. See note 2 *supra*. The data, however, are indicative of costs a small business plaintiff may face in an antitrust class action. In all of the cases listed in Table I, small businesses constituted 100% of the recovery fund claimants.

business will be precluded from prosecuting antitrust claims.⁵⁹ Small business also needs a strong deterrent to future antitrust violations.⁶⁰ Private litigation, particularly for treble damages,

TABLE I

Case	Recovery*	Attorneys' Fees	Costs
1. Labee v. Wm. Wrigley Jr. Co.	\$13,580,000	\$4,348,706	\$506,131
2. In re International House of Pancakes Franchise Litigation	13,000,000	1,250,000	75,000
3. In re Clark Oil & Ref. Corp. Anti-trust Litigation	1,900,000	481,488	64,409
4. Alexander v. National Football League	13,675,000	147,570	24,221
5. G & K Foods, Inc. v. Kentucky Fried Chicken	**	250,000	8,923
6. Merola v. Atlantic Richfield Co.	**	36,519	5,847

*does not include attorneys' fees, costs, or unquantifiable value of any equitable relief awarded

**recovery consisted solely of unquantifiable equitable relief

Sources: Recovery, attorneys' fees, and cost data — 5 CLASS ACT. REP., *supra* this note, at 334-56.

Small business' percentage of recovery data — SMALL BUSINESS REPRESENTATION, *supra* this note, at Tables 3 & 4.

⁵⁹ Because small business generally lack extensive assets, they cannot afford the luxury of active prosecution and will often be forced to absorb the cost of the violation. The Justice Department estimates that over the last decade, small businesses have recovered less than 0.5% of their estimated injuries from antitrust violations. 928 ANTITRUST & TRADE REG. REP. (BNA) A-5 (Aug. 23, 1979).

⁶⁰ The strength of a deterrent to illegal conduct is based on the severity of the penalties and the frequency with which they are imposed. With that in mind, Congress substantially increased the criminal penalties for Sherman Act violations in 1974. *See* note 26 *supra*. The Justice Department, however, has not substantially increased the number of criminal complaints it has filed. Rather, in the last two years the number of criminal complaints filed has decreased. 949 ANTITRUST & TRADE REG. REP. (BNA) A-28, F-3 (Jan. 31, 1980). Given the judicial reluctance to impose harsh criminal penalties on antitrust

can serve that function,⁶¹ but only if it is actively pursued.⁶² Since small business faces substantial disincentives to litigate antitrust claims,⁶³ the litigation's deterrent effect on potential violators is minimal. Moreover, small business needs a means to protect its fragile position in a competitive market.⁶⁴ While the antitrust laws are not designed to insulate small firms from the rigors of competition,⁶⁵ the laws seek to insure that companies are not forced out of the market simply because their small size makes them easy prey to anticompetitive behavior.⁶⁶ Unless the small business has an effective method of striking back at an-

violators, see generally 2 P. AREEDA & D. TURNER, *supra* note 1, ¶ 309c, criminal prosecution is an inefficient deterrent.

⁶¹ Because treble damages are punitive they may effectively deter anticompetitive behavior. Moreover, the likelihood of multi-party injury due to the possible wide ranging effects of a violator's conduct fortifies the viability of treble damages as a deterrent. Nonetheless, the deterrent effect of treble damages for a small business plaintiff may not be as great as when a large business is injured due to the potentially smaller recovery. Antitrust damages typically include such items as lost profits, loss of going concern value, reasonable reliance, and out of pocket expenses. See generally 2 P. AREEDA & D. TURNER, *supra* note 1, ¶¶ 343-44f. The size of these damage items may decrease as the size of the injured party decreases. Thus, even when a small business litigates, the deterrent effect of its treble damage suit will not be as great as when large businesses litigate.

⁶² See *Antitrust Enforcement Act of 1979: Hearings on S. 300 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 12 (1979) (testimony of John Shenefield) [hereinafter cited as *Hearings on S. 300*]; K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES* 118 (1976); cf. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (treble damage suits by direct purchasers will result in greater enforcement of the antitrust laws and thus will have a more effective deterrent effect than indirect purchaser suits).

⁶³ See text accompanying notes 39-58 *supra*.

⁶⁴ See SENATE SELECT COMM. ON SMALL BUS., *TWENTY-EIGHTH ANN. REP.*, S. REP. NO. 629, 95th Cong., 1st Sess. 6-7 (1978).

⁶⁵ 1 P. AREEDA & D. TURNER, *supra* note 1, ¶ 111c; Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1058 (1979); *Antitrust, Enforcement (Part 1): Hearings Before the Subcomm. on Antitrust, Consumers, and Employment of the House Comm. on Small Bus.*, 95th Cong., 2nd Sess. 63 (1978) (statement of John Shenefield) [hereinafter cited as *Antitrust Enforcement*].

⁶⁶ As the Supreme Court stated in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959), anticompetitive behavior "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." See Pitofsky, *supra* note 65, at 1059; *Antitrust Enforcement (Part 1)*, *supra* note 65, at 65 (statement of John Shenefield).

ticompetitive behavior, its continued existence in the market is threatened.⁶⁷

Not only do private enforcement tools fail to satisfy small business needs, they also fail to satisfy society's needs. The lack of an effective enforcement mechanism for injured small businesses deprives society of the benefits of a competitive marketplace.⁶⁸ Reduction in the number of market participants can result in limited consumer choices,⁶⁹ artificial price levels,⁷⁰ and inefficient operation of the remaining participants.⁷¹ Ineffective enforcement also deprives society of a deterrent to potential illegal conduct.⁷² A strong deterrent is necessary to protect the economy and to help prevent general citizen apathy for the antitrust laws. If the small business plaintiff, one of the entrusted enforcers of the antitrust laws,⁷³ cannot fulfill its role, the deterrent effect of private litigation is substantially weakened.⁷⁴

Past experience with existing methods of antitrust enforcement indicates these methods do not offer small business adequate protection from antitrust violations. Public enforcement is limited in types of relief it offers small business and the number

⁶⁷ The Director of the FTC's Bureau of Competition has stated that enforcement authorities need to place greater emphasis on protecting small business from predatory and exclusionary conduct. 949 ANTITRUST & TRADE REG. REP. (BNA) A-30 (Jan. 31, 1980). Without such increased emphasis, smaller firms will not have a chance to survive in the market. *Id.*

⁶⁸ The antitrust laws are based on a policy of unfettered competition. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951).

⁶⁹ *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 937, 549 P.2d 833, 843, 130 Cal. Rptr. 1, 11 (1976).

⁷⁰ See, e.g., R. BORK, *THE ANTITRUST PARADOX* 102-03 (1978); Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PA. L. REV. 1104, 1104-07 (1979). Artificial price levels are those in which individual price decisions have an impact on total industry price. See R. BORK, *supra* this note. Artificial prices may be higher than natural price levels, see Weiss, *supra* this note, or they may be lower than natural prices. See, e.g., Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

⁷¹ See 2 P. AREEDA & D. TURNER, *supra* note 1, ¶ 404c. In certain industries, however, concentration of resources in a small number of large firms may be more efficient than competition amongst numerous small businesses, and thus more beneficial to the consumer. *Id.* ¶ 408.

⁷² See notes 60-62 and accompanying text *supra*.

⁷³ See notes 31 & 32 *supra*.

⁷⁴ See note 62 *supra*.

of violations it can attack. Private enforcement, on the other hand, is too costly to justify litigation by injured small businesses, except where the potential recovery is substantial. Since neither of these enforcement schemes serve small business or societal needs, an alternative enforcement tool is necessary.

II. AN ALTERNATIVE: PARENS PATRIAE SUITS

A possible alternative to current private enforcement methods is a parens patriae suit by a state attorney general.⁷⁵ In a parens patriae suit, the state sues on behalf of those small businesses and individuals injured by a particular antitrust violation.⁷⁶ If the state is successful, these beneficiaries receive the benefits of any equitable relief recovered by the state.⁷⁷ Suits for money

⁷⁵ Another alternative, recently suggested by the Justice Department, is a reformation of current class action procedures under FED. R. CIV. P. 23. The proposal calls for two types of actions; a "class compensatory action" and a "public action." Revised Adm'n Class Action Reform Proposal, *reprinted in* 956 ANTITRUST & TRADE REG. REP. (BNA) G-1 (Mar. 20, 1980). The "class compensatory action" applies where 40 or more persons are injured in excess of \$300 each. The "public action" on the other hand, involves a lesser injury to a larger number of individuals. Maintenance of a "public action" requires injury to at least 200 persons not in excess of \$300 each. The combined amount in controversy must be at least \$60,000. Thus, if the injury to each individual is less than \$300 there must be more than 200 persons injured.

The proposal, however, is of limited applicability to antitrust injuries. Recent versions of the proposal specifically exclude antitrust violations from the range of actionable conduct under the "public action." *Id.* The proposal limits antitrust class damage suits to "class compensatory actions" and parens patriae suits under the Antitrust Improvements Act. 15 U.S.C. §§ 15c-15h (1976). As small business injuries are excluded from the latter, redress of these injuries is limited to "class compensatory actions." Given the requirements of the "class compensatory action," the Justice Department seems content to allow small business injuries of less than \$300 per firm to go uncompensated, except by way of individual treble damage suits. This denial of small business recovery for small injuries is indefensible. In fact, the Justice Department at one point argued against the "public action" antitrust limitation on the grounds that small businesses are not covered by the parens patriae alternative. See 956 ANTITRUST & TRADE REG. REP. (BNA) A-4 (Mar. 20, 1980). Thus, the proposal should be returned to its original form, allowing "public actions" for antitrust injuries, H.R. 5103, 96th Cong., 1st Sess. (1979), *reprinted in* 928 ANTITRUST & TRADE REG. REP. (BNA) F-1 (Aug. 23, 1979), or discarded altogether.

⁷⁶ See text accompanying notes 101-07 *infra* for a discussion of the relevant considerations in initiating a parens patriae suit including small businesses.

⁷⁷ If the state sues for structural relief, such as divestiture or dissolution, small business beneficiaries will receive the fruits of a more competitive econ-

damages, however, are currently limited to consumer beneficiaries by the Antitrust Improvements Act.⁷⁸ Assuming Congress amended the Act to allow small business inclusion in *parens patriae* suits,⁷⁹ these suits could be conducted like consumer suits presently authorized by the Act.⁸⁰ Thus small businesses would

omy, along with the rest of society. *But cf.* 2 P. AREEDA & D. TURNER, *supra* note 1, ¶ 328 b (state, as a private plaintiff, may have difficulty in obtaining structural relief). *See generally* Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act*, 48 TEX. L. REV. 54 (1969).

Small business beneficiaries will receive a more direct benefit if the relief sought is aimed at conduct, such as termination of price-fixing conspiracies, illegal tying arrangements, or some other form of anticompetitive behavior. An even greater direct benefit occurs if the state seeks affirmative equitable relief, such as mandatory, royalty free licensing of patents or trademarks. *See* note 149 *infra*.

⁷⁸ 15 U.S.C. §§ 15c-15h (1976).

⁷⁹ As discussed in note 80 *infra* and notes 161-210 and accompanying text *infra*, Congress should amend the Act to allow for inclusion of small business in *parens patriae* damage suits. In addition, Congress should specifically provide for *parens patriae* suits for injunctive relief on behalf of individual small business and natural person beneficiaries.

⁸⁰ Authorization of small business inclusion by Congress will not require creation of a new statutory scheme. Rather, Congress should merely adopt the provisions of the Antitrust Improvements Act currently applicable to natural person beneficiaries. 15 U.S.C. §§ 15c-15h (1976). Specifically, Congress should amend the following section with appropriate language.

§ 15c. Actions by state attorneys general

(a) *Parens patriae*; monetary and equitable relief; damages

(1) Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State and small businesses doing business in such State . . . to secure monetary and equitable relief as provided in this section for injury sustained by such natural persons and small businesses to their business or property The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts relief which have has been awarded for the same injury, or (B) which is properly allocable to (i) natural persons or small businesses who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity not included in section 15g (4) of this title.

§ 15g. Definitions

(4) The term "small business" includes any business entity qualifying as a small business under the Small Business Administration's small business size standards, issued pursuant to section 632 of this title, for small business investment

receive their allocable portion of any monetary relief awarded to the state.⁸¹ In addition, any monetary relief unclaimed by small business beneficiaries would be subject to court ordered disbursement plans or, alternatively, the money could remain with the state as a civil penalty.⁸²

Parens patriae suits can meet the needs of both small business and society. Parens patriae suits provide the small business with a low cost recovery mechanism by shifting major litigation costs to the state.⁸³ State parens patriae suits strengthen the deterrent effect of private litigation, as the disincentives faced by the

company assistance as set forth in the Code of Federal Regulations.

(5) The term "person" as used in sections 15c-15e of this title includes "natural person" and "small businesses" as defined in this section.

(new language in italics; deleted language in bold face).

The definition of small business, in proposed § 15g(4), is based on SBA standards in existence at the time of this comment's publication. If the SBA adopts its proposed new standards, based on the average number of full and part time employees, see note 2 *supra* & note 114 *infra*, the language in § 15g(4) would be obsolete. Congress could merely strike the words "for small business investment company assistance" from the proposed section. This would bring the language of § 15g(4) within the SBA standards. A definition based on average number of employees, however, does not adequately serve the definitional needs of parens patriae suits. A small business' inability to redress its antitrust injuries is a result of its lack of financial net worth. Thus, Congress should rely on a net worth/net income definition regardless of the SBA's proposed revisions. To achieve this goal, Congress could require the SBA to establish separate size standards for small businesses in parens patriae suits. This separate standard, like the SBA's other size standards, would be periodically updated to reflect changing economic conditions.

⁸¹ Cf. 15 U.S.C. § 15e (1976) (natural person beneficiaries of parens patriae suits are entitled to the monetary relief secured by a state attorney general).

⁸² Cf. *id.* (any unclaimed monetary relief secured in a parens patriae suit may be distributed as the court directs or may be deposited with the state as a civil penalty).

⁸³ The degree to which litigation costs will be shifted from the injured small business to the state will depend on the particular circumstances of the litigation and the type of remedy sought. The injured small business will still face nonmonetary costs in appearing at depositions, answering interrogatories, and serving as a witness for the state's action. These costs will vary with the facts of a given case. The small business may face additional costs, if the state is seeking treble damages, when it makes a claim for its portion of the damages recovered by the state. Nonetheless, a small business' cost of involvement in a parens patriae suit will be significantly less than if it had to bring the suit itself.

small business do not preclude the state's litigation.⁸⁴ Furthermore, the competitive posture of small business will improve with the more effective response to illegal anticompetitive behavior offered by *parens patriae* suits. Vigorous enforcement by the state will help ensure the existence and resulting benefits of a competitive marketplace.

Parens patriae suits, however, are not a cost free alternative. Antitrust litigation is expensive, regardless of who pays.⁸⁵ Additional costs may be involved in a state *parens patriae* suit when the beneficiaries of the suit make their individual damage claims.⁸⁶ The entire process of investigation, preparation, litigation, and distribution requires scarce state resources to be allocated from other potential uses to antitrust enforcement. Moreover, the development of antitrust expertise by the state is both time consuming and expensive.⁸⁷ In addition, there

⁸⁴ As discussed in the text accompanying notes 85-86 *infra*, the state must still face the high costs of litigating an antitrust suit. The state's ability to spread these costs over society, however, reduces the impact of disincentives created by high costs. But cost, along with various other factors, will enter into the state's decision as to whether or not to sue as *parens patriae*. See text accompanying notes 101-07 *infra*.

⁸⁵ See notes 40-45 and accompanying text *supra*.

⁸⁶ See, e.g., *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 1973-1 Trade Cas. ¶ 74,350 (S.D.N.Y. 1972), where the court awarded \$20,496.20 in costs incurred in distributing funds to 4,428 claimants. This award did not include the costs incurred by each individual claimant. The Arthur Young & Co. study on Justice Department resource requirements, RESOURCE REQUIREMENTS, *supra* note 49, indicates that costs of administration of claims was approximately \$30,000 for antitrust and securities class actions analyzed in the study. *Id.* at 9.

⁸⁷ While states may not presently possess sufficient expertise to litigate a full range of antitrust matters, the situation is improving. State antitrust expertise is growing due to a combination of increased responsibility under the Antitrust Improvements Act, federal funding under § 309 of the Crime Control Act, 42 U.S.C. § 3739 (1976), and the use of revolving funds to put recovered monies back into enforcement budgets. The latter two factors have significantly helped the states to increase their enforcement programs. Section 309 of the Crime Control Act, *id.*, provides for approximately \$30 million in funds to be distributed to state antitrust agencies. These funds, most of which have been distributed, have been used for various purposes, ranging from hiring additional personnel to developing computerized litigation support systems. See *Antitrust Enforcement (part 1)*, *supra* note 65, at 1114-25. Revolving fund provisions, which funnel a certain percentage of antitrust monetary recovery into a state's antitrust program, have also increased state antitrust budgets. See Miles, *Current Trends in State Antitrust Enforcement*, 47 ANTITRUST L.J. 1343, 1353 (1979).

is a social cost in the bureaucratization of a task which has traditionally been a private function.

Although these costs of *parens patriae* suits are significant, the benefits of small business inclusion justify a state's utilization of *parens patriae*. State intrusion upon the traditionally private function of litigation is justified as part of the state's important role in protecting the marketplace.⁸⁸ The consuming public, as well as individual businesses, benefit from a free competitive marketplace.⁸⁹ As a beneficiary, the public should be required to pay for the protection to the commonweal brought about by antitrust enforcement.⁹⁰ By shifting litigation expenses to the state, the inevitably high costs of antitrust litigation are spread over the broad base of the state's citizenry. Moreover, state intrusion is necessitated by the present inability of existing enforcement techniques, both public⁹¹ and private⁹² to meet small

In addition to fostering greater state expertise, increased state activity can make state attorney positions more attractive to members of the antitrust bar. While the states cannot compete equally with the lure of the federal government or private practice, see *Empirical Research Project-Reviving State Antitrust Enforcement: The Problem With Putting New Wine in Old Wine Skins*, 4 J. CORPORATION L. 547, 577-78 (1979), state antitrust work can become an alternative method for attorneys to gain practical experience and engage in useful public service.

⁸⁸ See *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450-51 (1945).

⁸⁹ Cf. 2 P. AREEDA & D. TURNER, *supra* note 1, ¶ 402b (a perfectly competitive economy results in maximization of consumer welfare). The Supreme Court has recognized the importance of antitrust enforcement to a competitive marketplace. "Every violation of the antitrust laws is a blow to the free enterprise system envisaged by Congress. . . . This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

⁹⁰ If the public is allowed to receive the benefits of antitrust enforcement without paying for them, the public is getting a "free ride" on the efforts of the small business litigant. Cf. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (vertical non-price restraints allow a manufacturer to limit a dealer's ability to take a "free ride" off of another dealer who provides pre-sale services). See also Posner, *supra* note 43, at 6-10; Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960).

⁹¹ See *Hearings on S. 300*, *supra* note 62, at 37 (prepared statement of Barry Bosworth); *Antitrust Enforcement (Part 2)*, *supra* note 65, at 63-64 (testimony of Alfred F. Dougherty); Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570, 572-73 (1970). See generally note 60 *supra*; notes 33-38 and accompanying text *supra*. Proposed cutbacks in existing enforce-

business needs for effective antitrust enforcement. State expertise may not be presently sufficient to meet small business needs in all types of antitrust matters. But as state expertise continues to grow, the state's ability to protect injured small businesses will increase.⁹³

A. *Administrative Concerns Prior To Institution Of Litigation*

If *parens patriae* is to be used by the state to aid injured small businesses, the state will have to take steps to ensure the effectiveness of these suits. In order to meet or exceed current enforcement levels, the state will need the ability to sue for either injunctive or monetary relief. Assuming that such authority can be established, the states will have to develop investigative procedures to ensure detection of small business injuries. Once injuries are detected, the state must decide whether or not to sue as *parens patriae* and, if it decides to sue, which companies to represent in the suit.

Development of the state's ability to investigate and detect violations is an essential preliminary step. To a limited extent, the state can rely on its own investigative capabilities to detect violations involving small business.⁹⁴ Given the small size of most state antitrust units,⁹⁵ however, the state attorney general's of-

ment structures make state intrusion essential, if only to maintain existing enforcement levels. Recent legislation in both the House and Senate would drastically curb the FTC's authority over certain industries. In addition, the legislation provides for a legislative veto over Commission action in certain areas. See 941 ANTITRUST & TRADE REG. REP. (BNA) A-24 (Nov. 29, 1979); 951 ANTITRUST & TRADE REG. REP. (BNA) A-6 (Feb. 14, 1980).

⁹² See text accompanying notes 39-58 *supra*.

⁹³ See note 87 *supra*.

⁹⁴ State antitrust investigation resources are generally considered inadequate and, thus, cannot be the sole means for detection of violations. See Rubin & Malet, *State Initiatives in Antitrust Investigation*, 4 J. CORPORATION L. 513, 518-20 (1979). With the receipt of federal grant money, however, see note 87 *supra*, state antitrust investigations have increased dramatically. *Empirical Research Project*, *supra* note 87, at 611.

⁹⁵ See Miles, *supra* note 87, at 1361-62. It is important to note that Miles' figures are prior to infusion of federal grant money under the Crime Control Act. While the majority of grant recipient states spent their money on personnel, staff sizes are still small compared to private law firms or federal antitrust units. See *Antitrust Enforcement (Part 1)*, *supra* note 6, at 1117-18 (reprinted remarks of Ky P. Ewing, Jr. before the 1978 Conference of Western Attorneys

office will also have to rely on federal government sources,⁹⁶ other state attorney generals,⁹⁷ and injured small businesses⁹⁸ for information concerning many antitrust violations. To facilitate this flow of information, the attorney general's office should embark on educational⁹⁹ and cooperative efforts¹⁰⁰ with these

General); *Empirical Research Project*, *supra* note 87, at 570.

⁹⁶ Under 15 U.S.C. § 15f(a) (1976), whenever the Justice Department has brought an antitrust action, it must so inform any state attorney general who would be able to bring a parens patriae suit based on the same alleged violation.

Section 15f(b) requires that the Justice Department make available, at the request of a state attorney general litigating a parens patriae action under § 15c any investigative files or other materials which are or may be relevant to the litigation. If the Department materials relate to matters during or after a grand jury investigation, the state must obtain a court order for their release under FED. R. CRIM. P. 6(e). 930 ANTITRUST & TRADE REG. REP. (BNA) D-6 (Sep. 13, 1979). States can also obtain information from the FTC. 15 U.S.C. § 46(f) (1976). This information can include internal memoranda and confidential business information, but not trade secrets or customer lists. *Id.*

⁹⁷ State antitrust enforcement officials can cooperate on a variety of matters. Regional groups have formed to discuss strategy and cooperation, resulting in the creation of data banks for complex litigation. 909 ANTITRUST & TRADE REG. REP. (BNA) D-3 (Apr. 12, 1979). Six New England state attorney generals recently combined efforts to file a joint complaint against distributors of engineering drafting supplies, alleging price-fixing. 942 ANTITRUST & TRADE REG. REP. (BNA) D-2 (Dec. 6, 1979). In addition, to reduce duplicative research, a recent conference of state attorney generals proposed the creation of a "brief bank" to be coordinated by the National Association of State Attorneys General. 930 ANTITRUST & TRADE REG. REP. (BNA) D-7 (Sep. 13, 1979).

⁹⁸ See *Empirical Research Project*, *supra* note 87, at 615, 658. On the federal level, the Justice Department has established "antitrust hotlines" to increase the flow of citizen complaints. 867 ANTITRUST & TRADE REG. REP. (BNA) A-19 (June 8, 1978). See also Comegys, *Quo Vadis: Case Selection By the Antitrust Division of the Department of Justice*, 46 ANTITRUST L.J. 563, 564 (1977). Establishment of similar "hotlines" on the state level would be a step, albeit a small one, towards improving small business awareness of antitrust principles and increasing the detection capabilities of state antitrust units.

⁹⁹ State antitrust officials have played the role of student and teacher. State antitrust officials have participated in various seminars sponsored both by the federal government, see *Antitrust Enforcement (Part 1)*, *supra* note 65, at 1125-26, and other state attorney generals. See Rubin & Malet, *supra* note 94, at 518 n.33. States have developed various educational plans to raise antitrust consciousness. Such educational efforts help to increase small business awareness of state enforcement programs, resulting in greater detection of violations. See *Empirical Research Project*, *supra* note 87, at 615.

¹⁰⁰ See *Empirical Research Project*, *supra* note 87, at 594-98; note 97 *supra*.

groups. In particular, the state must educate small businesses as to the state's *parens patriae* function. Cooperation from the injured parties is necessary for both detection and investigation of violations.

Once a state learns of a violation, the state must weigh various factors to determine whether or not to institute *parens patriae* proceedings. The strength of a state's *prima facie* case may be the most important factor.¹⁰¹ The state should also consider the nature of the particular violation alleged¹⁰² and the extent of the alleged injury.¹⁰³ The type¹⁰⁴ and size¹⁰⁵ of possible recovery must also be appraised, as well as the effect on the competitive marketplace of redressing the violation.¹⁰⁶ Finally, the state

¹⁰¹ See *Empirical Research Project*, *supra* note 87, at 659.

¹⁰² Some antitrust violations may be more suitable for state *parens patriae* suits than others. From 1975-78, states brought nearly as many price-fixing suits as all other types of suits combined. *Id.* at 667. Although not broken down in the same manner as state data, Justice Department figures indicate a similar emphasis. 949 ANTITRUST & TRADE REG. REP. (BNA) F-1 (Jan. 31, 1980). The emphasis on price-fixing is due primarily to the greater number of price-fixing violations than other types of antitrust violations, see *Comegys*, *supra* note 98, at 564, and the difficulty in proving violations involving market analysis, such as monopolization, attempted monopolization, and anticompetitive merger. See Malina, *Recent Developments in Monopolization Litigation*, 47 ANTITRUST L.J. 1135, 1136 (1978). See generally Ames, *Evidentiary Aspects of Relevant Product Market Proof in Monopolization Cases*, 26 DE PAUL L. REV. 530 (1977).

¹⁰³ The scope of the alleged violation can have varying effects on the state's decision to litigate. If the effects of the violation are national or regional, the state may choose to join the "bandwagon" in order to take advantage of shared litigation resources. See, e.g., *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971); *Empirical Research Project*, *supra* note 87, at 581. Conversely, the action may be too broad for the state to deal with. It is doubtful that a state could bring an action similar to the U.S. government's suit against IBM. A localized injury might be more suitable for state litigation. See *Antitrust Enforcement (Part 1)*, *supra* note 65, at 1113-14 (reprinted remarks of Ky P. Ewing, Jr. before the 1978 Conference of Western Attorneys General). The violation might be so localized and of such minor impact, however, as not to warrant any state activity.

¹⁰⁴ It may be difficult for private plaintiffs to obtain structural relief, such as divestiture or dissolution. 2 P. AREEDA & D. TURNER, *supra* note 1, ¶ 328b.

¹⁰⁵ The size of the potential monetary recovery is a particularly important consideration if the state has a revolving fund provision. See note 87 *supra*. One of the main criticisms of revolving funds, however, is that they create too strong an incentive for states to seek high damage awards. Miles, *supra* note 87, at 1353-54.

¹⁰⁶ In most situations, redress of the violation will benefit the economy. See

must determine whether it has sufficient resources to strike at the allegedly illegal conduct.¹⁰⁷

After the state has considered these factors, and decides to bring a parens patriae suit, it must then determine which business entities to include in the suit. The state should not be required to identify individual small business beneficiaries as is required in a typical class action suit.¹⁰⁸ The state, however, must make some distinction between those companies represented in its suit and those which are not. Parens patriae is designed to benefit those who are incapable of protecting themselves.¹⁰⁹

notes 64-71 and accompanying text *supra*. Redress of an antitrust violation may, however, result in the ruin of the defendant. The extent of competition may be decreased as defendants are driven out of the market by overzealous antitrust enforcement. Moreover, there may be situations, for example vertical non-price restraints, in which anticompetitive behavior is beneficial to small business. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1196-1200 (1977). In these situations, it may be preferable to allow the anticompetitive behavior to continue. *Cf.* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (approving use of reasonable location clause in franchise agreement). Compare Elzinga, *supra* this note, with Pitofsky, *supra* note 65, at 1058.

¹⁰⁷ See Miles, *supra* note 87, at 1352-55.

¹⁰⁸ Individual identification of those small businesses represented by the state can potentially serve two functions, neither of which is essential in most parens patriae cases. Individual identification acts as a necessary prerequisite to individual notice. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355 (1977). While individual notice is required for class actions brought under FED. R. CIV. P. 23(b)(3), *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), it is not required in a parens patriae suit for treble damages. 15 U.S.C. § 15c(b)(1) (1976). Assuming Congress enacts the amendment proposed in note 80 *supra*, individual identification would not be necessary in small business parens patriae litigation for purposes of notice.

Individual identification, however, is also a prerequisite for determination of damages. While some courts have rejected aggregate proof of damages in class actions, *see, e.g., Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974), the Antitrust Improvements Act allows aggregate proof of damages in parens patriae suits where the defendant has allegedly fixed prices. 15 U.S.C. § 15d (1976). Thus, the need for individual identification is obviated in these cases. As nearly half of state initiated suits involve price-fixing, *see* note 102 *supra*, individual identification will only be required in approximately half of the cases brought by state attorney generals. As with the identification for notice requirement, small business will benefit from the price-fixing proof provision in the Antitrust Improvements Act, 15 U.S.C. § 15d (1976), if Congress enacts the amendment proposed in note 80 *supra*.

¹⁰⁹ As originally developed at common law, parens patriae was part of the

Thus the state should only represent those businesses whose small size precludes them from litigating their own claims.

A broad, standardized small business definition will allow the state to delineate the class of beneficiaries it represents in a given *parens patriae* suit. Such a definition exists in the Small Business Administration's (SBA) small business size standards.¹¹⁰ The SBA standards define small business status for a variety of government programs.¹¹¹ The standards, which vary with the particular industry involved,¹¹² are based on such criteria as independent ownership, nondominance of the business's field of operation, financial status, and number of employees.¹¹³ Use of these standards simplifies the state's task by providing a cutoff point for state representation, without requiring a detailed analysis of each intended beneficiary.¹¹⁴

King's royal prerogative to protect idiots, infants, incompetants, and others incapable of protecting their own interests. *See Malina & Blechman, supra* note 8, at 197-202; *Curtis, supra* note 8, at 896-907.

In the antitrust context, Congress adopted *parens patriae* in the Antitrust Improvements Act to benefit consumers who were incapable of litigating their own claims. H.R. REP. No. 499, 94th Cong., 1st Sess. 6 (1975).

¹¹⁰ 13 C.F.R. §§ 121.3-3-16 (1980).

¹¹¹ The major categories of size standards deal with small business status for government procurement, *id.* § 121.3-8, sales of government property, *id.* § 121.3-9, SBA loans, *id.* § 121.3-10, small business investment company assistance, *id.* § 121.3-11, and subcontracting. *Id.* § 121.3-12.

¹¹² *See* SBA SCHEDULES in 13 C.F.R. (1980) following § 121.3-16.

¹¹³ The Small Business Act states that a small business concern is "one which is independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. § 632 (Supp. II 1978). The Act allows the Small Business Administration to use such additional criteria as number of employees and dollar volume of business. *Id.* Although the Administration currently uses both of these discretionary criteria in defining small business, it has proposed to limit the considerations to number of employees. *See* note 2 *supra*.

¹¹⁴ Congress should adopt, by appropriate legislation, the size standards set forth in 13 C.F.R. § 121.3-11 (1980), *see* note 2 *supra*, for use in state *parens patriae* suits on behalf of small business. *See* note 80 *supra*.

If the SBA adopts the proposed new size standards, *see* note 2 *supra*, it is arguable that these new standards should apply to *parens patriae* suits including small businesses as well. This would insure that the standards are reflective of current economic conditions, as they are periodically updated by the SBA. *Compare* 13 C.F.R. § 121.3 SCHEDULES A-E (1971) *with* 13 C.F.R. § 121.3 SCHEDULES A-E (1980).

Adherence to the existing SBA guidelines, however, is justifiable. The SBA rationale in considering new guidelines is not that the existing guidelines are an invalid indicator of small business status. Rather, the SBA is proposing a

B. Remedies In Small Business Parens Patriae Suits

Once a state decides to sue and determines the perimeters of the beneficiary class, it is restricted as to the type of suit it can bring. Case law authority exists for parens patriae suits for injunctive relief on behalf of natural persons and small businesses. In contrast, parens patriae suits for treble damages are governed by the Antitrust Improvements Act, which specifically excludes small businesses from such suits.¹¹⁵ Therefore, Congress must amend the Act before states can sue for treble damages on behalf of small businesses.¹¹⁶ Congress should also include authority for small business inclusion in equitable parens patriae suits in this amendment.¹¹⁷ Such a provision would aid the cause of injured small businesses by clearing up any uncertainty regarding the availability of these suits.

1. Parens patriae suits for injunctive relief

State parens patriae standing to sue for injunctive relief¹¹⁸ arose as a means of invoking the United States Supreme Court's original jurisdiction in an equitable action.¹¹⁹ While the Court

uniform definition to reduce the present complexity and confusion caused by standards which vary with the type of government program involved. 45 Fed. Reg. 15,442, 15,443 (1980). Thus a definition based on financial worth can continue to accurately delineate large and small businesses in state parens patriae suits, provided the standards are periodically updated by the SBA, the FTC, or the Justice Department. Furthermore, use of a net worth/net income based definition ensures that parens patriae beneficiaries are those firms lacking sufficient financial resources to litigate their own claims.

¹¹⁵ 15 U.S.C. § 15c(a)(1) (1976); see notes 165-68 and accompanying text *infra*.

¹¹⁶ See note 80 *supra* for the text of a proposed amendment to the Act.

¹¹⁷ *Id.*

¹¹⁸ When a state sues as parens patriae for injunctive relief, it must satisfy two sets of requirements: those relating to parens patriae standing, see generally notes 122-52 and accompanying text *infra*, and those relating to standing to sue for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 (1976). See note 137 *infra*.

¹¹⁹ See, e.g., *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901). See generally Malina & Blechman, *supra* note 8, at 202-03.

The United States Supreme Court's original jurisdiction is provided for by Article III of the United States Constitution. U.S. CONST. art. III, § 2, cl. 2. The specific parameters of the Court's original jurisdiction are set forth in 28

has seldom questioned the states' capacity to sue for injunctive relief,¹²⁰ it has frequently expressed concern over a state's assertion of original jurisdiction in a particular case.¹²¹ Unfortunately, some district courts have inaccurately adopted the Supreme Court's original jurisdiction requirements. The result is confusion and the erection of an unnecessary barrier to small business inclusion in equitable *parens patriae* actions. Recent cases, however, have lowered this barrier, thus enabling states to bring equitable *parens patriae* suits involving small businesses.

The Supreme Court imposes two requirements on state *parens patriae* suits brought under its original jurisdiction. First, the state can only sue to protect an interest independent of the interests of individual citizens,¹²² such as protection of natural resources,¹²³ the general economy,¹²⁴ and public health.¹²⁵ Second, the suit must be brought for the benefit of a substantial number of individuals, rather than for a small group.¹²⁶ The purpose of these requirements is to avoid an inundation of the Court's original jurisdiction docket.¹²⁷ Moreover, the Court is especially con-

U.S.C. § 1251 (1976). A state's *parens patriae* suit could fall within any of the three types of original jurisdiction set forth in § 1251. Section 1251 provides for exclusive jurisdiction in suits between two states and non-exclusive jurisdiction in suits between the U.S. and a state and in suits brought by a state against citizens of another state.

¹²⁰ See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258-60 (1972); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 447 (1945); *Malina & Blechman*, *supra* note 8, at 202-03. *But see* *Curtis*, *supra* note 8, at 907-15.

¹²¹ Compare *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) with *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938); *Oklahoma v. Atchison, T. & S.F. Ry.*, 220 U.S. 277 (1911).

¹²² See, e.g., *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 451-52 (1945); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 393 (1938).

¹²³ See, e.g., *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (withdrawal of natural gas from state's territory); *Kansas v. Colorado*, 206 U.S. 46 (1907) (diversion of river water to outside state's boundaries).

¹²⁴ See, e.g., *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) (railroad price-fixing conspiracy which harmed the state's economy).

¹²⁵ See, e.g., *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (air pollution control); *Missouri v. Illinois*, 180 U.S. 208 (1901) (sewage dumping in public waterways); *Louisiana v. Texas*, 176 U.S. 1 (1900) (quarantines).

¹²⁶ E.g., *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923); *New York v. New Jersey*, 256 U.S. 296, 309 (1921).

¹²⁷ *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976).

cerned with avoiding the role of trier of fact whenever possible.¹²⁸ Cases which do not satisfy these requirements may be brought in United States district courts or in appropriate state courts.¹²⁹

In most cases, the two requirements are interrelated so that satisfaction of one satisfies the other.¹³⁰ For example, in *Missouri v. Illinois*,¹³¹ the Supreme Court granted standing to Missouri in a suit to enjoin sewage dumping into the Mississippi River. The state sought to redress an injury independent of that to individual citizens and, thus, in the Court's opinion, benefited a substantial number of individuals.¹³² In contrast, the Supreme Court denied state standing in *Oklahoma ex rel. Johnson v. Cook*,¹³³ where the state tried to sue on behalf of the creditors and depositors of a liquidating bank. Not only was the state suing on behalf of a small group; the interests involved were the individual interests of the bank's creditors and depositors.¹³⁴ In both of these cases the Court considered these two requirements together to either grant or deny state standing.

These requirements, designed to avoid inundation of the Supreme Court's original jurisdiction docket, should not be imposed at the district court level. The district court need not be as concerned with its ability to act as trier of fact as the Supreme Court is with its ability to serve in the same role. District courts routinely act as triers of fact while the Supreme Court does so only in very few cases, those involving original jurisdiction.¹³⁵ Thus, the Supreme Court has far less expertise than the

¹²⁸ *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971). See generally Note, *Ohio v. Wyandotte Chemicals Corp.: Forum Non Conveniens in the Supreme Court*, 67 Nw. U.L. REV. 59 (1972).

¹²⁹ See *United States v. Nevada*, 412 U.S. 534, 538 (1973); *Washington v. General Motors Corp.*, 406 U.S. 109, 114 (1972); *Illinois v. City of Milwaukee*, 406 U.S. 91, 98 (1972); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 500 (1971).

¹³⁰ See Comment, *State Standing to Challenge Federal Administrative Action: A Re-Examination of the Parens Patriae Doctrine*, 125 U. PA. L. REV. 1069, 1074-76 (1977).

¹³¹ 180 U.S. 208 (1901).

¹³² *Id.* at 241.

¹³³ 304 U.S. 387 (1938).

¹³⁴ *Id.* at 395.

¹³⁵ The Supreme Court rarely deals with cases under its original jurisdiction. In the 1976 Term, for example, only eight of the cases on the Court's 4,730 case docket were brought under the Court's original jurisdiction. Statement

district courts in this role. Since section 16 of the Clayton Act¹³⁶ provides the district court with standing requirements,¹³⁷ there is no need to adopt these additional original jurisdiction requirements.

Some district courts, however, adopted the Supreme Court's requirements in various equitable *parens patriae* actions. In the leading case of *Land O' Lakes Creameries, Inc. v. Louisiana State Board of Health*,¹³⁸ the District Court for the Eastern District of Louisiana applied the Supreme Court's original jurisdiction requirements to deny a state standing to intervene as *parens patriae* in a commerce clause case. Minnesota sought to intervene on behalf of dried milk producers to enjoin enforcement of an allegedly unconstitutional Louisiana dried milk labeling statute. Judge Skelly Wright held the state was attempting to redress private injuries and thus lacked the requisite independent interest.¹³⁹ Unfortunately, the court failed to examine the rationale behind application of these requirements in the district court. Rather the court merely cited *Oklahoma ex rel. Johnson v. Cook*¹⁴⁰ as allowing *parens patriae* suits only when the suit was to protect an independent interest. According to the court, both *Land O' Lakes* and *Cook* involved a state's effort to protect a small segment of its economy. The court maintained the protection of the economy was an independent interest only when the effects of the illegal acts reached a substantial number of individuals.¹⁴¹ The court's superficial analysis of the effects in *Land O' Lakes*, however, offers no guidance as to when an interest is significant enough to be independent.

Recent district court cases continue to apply the Supreme Court's original jurisdiction requirements. But the courts' analysis has developed beyond the perfunctory treatment in *Land O'*

Showing the Number of Cases Filed, Disposed of, and Remaining on Dockets at Conclusion of October Terms-1974, 1975, and 1976, 433 U.S. 920 (1977).

¹³⁶ 15 U.S.C. § 26 (1976); see note 32 *supra*.

¹³⁷ A plaintiff, in an action brought for equitable relief under § 16, 15 U.S.C. § 26 (1976), must show a violation of the antitrust laws and threatened loss or damage. See *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 130-31 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

¹³⁸ 160 F. Supp. 387 (E.D. La. 1958).

¹³⁹ *Id.* at 389.

¹⁴⁰ 304 U.S. 387 (1938).

¹⁴¹ 160 F. Supp. at 389.

Lakes. For example, in *Burch v. Goodyear Tire & Rubber Co.*,¹⁴² Maryland, acting as parens patriae, sought to enjoin illegal tying agreements which forced gasoline dealers to buy tires, batteries, and accessories from particular distributors. The defendant moved to dismiss, arguing that since the suit was for the benefit of the individual gasoline dealers, *Oklahoma ex rel. Johnson v. Cook*¹⁴³ required the court to deny the state standing. In denying defendant's motion, the court agreed that some individuals would benefit from the suit more than others.¹⁴⁴ According to the court, however, the suit was a valid assertion of parens patriae jurisdiction. As the court correctly stated, the antitrust laws are grounded on the assumption that injury to a few is injury to the whole.¹⁴⁵ The court felt redress of an antitrust injury protects the state's economy and thus satisfies the independent injury requirement regardless of the localized effect of the injury.¹⁴⁶

The court, however, stopped short of total abandonment of the independent injury requirement. Rather, the court limited the *Cook-Land O' Lakes* type denial of standing to suits involving a direct monetary gain to the beneficiaries. The court felt the rationale behind the denial of standing in *Cook* was that individual citizens would receive a direct monetary benefit from the state's suit.¹⁴⁷ The presence of a direct monetary benefit created

¹⁴² 420 F. Supp. 82 (D. Md. 1976), *aff'd*, 554 F.2d 633 (4th Cir. 1977).

¹⁴³ 304 U.S. 387 (1938).

¹⁴⁴ 420 F. Supp. at 89.

¹⁴⁵ *Id.*

¹⁴⁶ A similar analysis was adopted by the District of Columbia Circuit Court of Appeals in *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir.), *cert. denied*, 429 U.S. 977 (1976). Pennsylvania sought to enjoin the SBA's cutoff of disaster relief to Pennsylvania small businesses. The court denied state standing on the grounds that the state could not sue the federal government as parens patriae. The court in dicta, however, indicated the state may have satisfied the independent injury requirement. The court felt protection of the state's internal economy qualified as an independent interest. But according to the court, it was not clear when a particular injury was significant enough to constitute injury to the state's economy. Given the basis of the court's denial of standing it was able to avoid this difficult question. The court, however, noted some situations which might satisfy the requirement. These included the facts in *Kleppe*, where a direct injury to a fairly narrow class of persons has substantial generalized economic effects.

¹⁴⁷ In *Cook*, the state was seeking to enforce the statutory liability of the shareholders of a liquidating bank. *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 389 (1938). If the state had been successful, the shareholders would have

the appearance of an attempt to redress merely individual injuries, according to the court. In the *Burch* case, no particular gasoline dealer would receive a direct monetary benefit.¹⁴⁸ Lack of a direct monetary benefit supported the state's assertion that the suit was designed to protect the state's general economy.

Burch allows for *parens patriae* suits on behalf of small business in some, but not all, situations. Under *Burch*, the state must still claim that injury to small businesses constitutes injury to the general economy. The success of this claim will vary with the nature of the injunctive relief sought. For example, if the state sought injunctive relief in the form of mandatory, royalty free licensing of patents or trademarks, the small business would receive a direct monetary benefit.¹⁴⁹ State standing should be denied in this type of case, unless the state makes a strong showing of an injury to its general economy.¹⁵⁰ When the relief does not provide a direct monetary benefit, however, as with enjoinderment of the price-fixing conspiracy in *Burch*, the state has standing to sue as *parens patriae* notwithstanding a failure to show an independent injury.

The method of analysis developed in *Burch* was followed in *Missouri v. National Organization for Women, Inc.*¹⁵¹ Missouri brought suit as *parens patriae* to enjoin the National Organization for Women's (NOW) boycott of states which had not ratified the Equal Rights Amendment. Under the boycott, various

deposited the par value of their shares with the state. *Id.* Depositors and creditors of the bank could seek satisfaction of their claims from this fund. *Id.*

¹⁴⁸ 420 F. Supp. at 89.

¹⁴⁹ For purposes of this comment, equitable relief in which the defendant is ordered to perform affirmative conduct that provides a financial opportunity for a plaintiff is considered to involve a direct monetary benefit. This type of equitable relief is not as direct of a benefit as the benefit involved in *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938). See note 147 *supra*. But in comparison to other forms of equitable relief, such as enjoinderment of price-fixing conspiracies or divestiture, there is a more direct benefit with affirmative equitable relief.

¹⁵⁰ Although *Burch* appears to deny standing in any *parens patriae* case involving a direct monetary benefit, there may be cases involving a direct monetary benefit which injure the general economy. See note 159 *infra*. In those suits involving a clear injury to a state's general economy, state *parens patriae* standing should be granted regardless of the presence of a direct monetary benefit.

¹⁵¹ 467 F. Supp. 289 (W.D. Mo. 1979), *aff'd*, No. 79-1379 (8th Cir., Mar. 28, 1980).

national organizations refused to hold conventions in nonratifying states. Missouri claimed the boycott, allegedly illegal under section 1 of the Sherman Act, would injure convention and tourist related businesses. This injury would in turn injure the general economy of the state, according to Missouri. In response, NOW claimed that *Land O' Lakes* required the court to dismiss the suit as it was brought to benefit individual interests.

The court rejected the *Cook-Land O' Lakes* line of cases in favor of the recent *Burch* analysis and denied defendant's motion to dismiss. According to the court, plaintiff's evidence established that a direct injury to one segment of society could cause substantial harm to the state's general economy.¹⁵² Moreover, the state's suit would not result in a direct monetary benefit to any of the suit's beneficiaries. Rather the suit would benefit a wide range of societal interests, as the NOW boycott harmed more than the convention and tourist industries.¹⁵³ Thus, although the court eventually rejected Missouri's claim on the merits,¹⁵⁴ the state had standing to sue as parens patriae.¹⁵⁵

The court's analysis in *NOW* indicates small business inclusion in equitable parens patriae suits is an available remedy in many situations. The court in *NOW*, like the court in *Burch*, did

¹⁵² Missouri offered expert testimony to show the extent of the injury to its general economy. *Id.* at 298. The Missouri economy was divided into over 50 sectors. The direct impact of the boycott was felt by only 13 of those sectors, according to the expert testimony. As all of the sectors of the economy are interrelated, however, the boycott indirectly affected every sector of the economy. Moreover, as its impact moved through the various sectors, its effect was multiplied, so that the injury to the general economy was much greater than the injury to the 13 directly affected sectors.

¹⁵³ *Id.* at 300-01.

¹⁵⁴ The court held NOW's activities did not constitute an illegal group boycott under § 1 of the Sherman Act. 15 U.S.C. § 1 (1976). The court's holding was based on two grounds. The court felt defendant's activities were immune from the Sherman Act under the political activity doctrine of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). 467 F. Supp. at 304. Even if NOW's activities did not acquire *Noerr* immunity, the court maintained there was no violation of the Sherman Act as the activities were not directed at achieving anticompetitive goals, but rather political goals. *Id.*

¹⁵⁵ The court noted that it would consider other factors besides the type and extent of the injury involved in determining parens patriae standing. 467 F. Supp. at 300. The court felt the unique position of the state as both parens patriae plaintiff and ultimate target of the NOW boycott added to the validity of the state's standing claim. *Id.*

not discard the independent injury requirement. Thus the state has the minimal requirement of alleging that small business injuries also injure its general economy. The degree to which the state is required to prove the private injury's effect on the general economy varies with the type of injunctive relief. Judicial scrutiny of a state's claim of independent injury should increase as the state's suit comes closer to an attempt to seek individual monetary benefits. But even where no direct monetary benefit is involved, the state should be prepared to establish its claim of independent injury. Proof of a general economic injury along with the lack of a direct monetary benefit presents a clear case of valid *parens patriae* standing, as in *NOW*.

Even though the *Burch-NOW* treatment of the independent injury/injury to a substantial number requirements favors small business inclusion, the requirements should be abandoned at the district court level.¹⁵⁶ Recent application of these requirements in Supreme Court original jurisdiction cases indicates that they are not designed for use in lower federal courts.¹⁵⁷ Even assuming a district court's adoption of these requirements is justifiable, *Burch* and *NOW* weakened the requirements to the point that they no longer resemble those applied by the Supreme Court.¹⁵⁸ A distinction based on the type of equitable remedy sought is meaningless. Many antitrust cases of broad societal impact involve equitable relief resulting in a direct monetary benefit to a beneficiary class.¹⁵⁹ Thus, Congress should amend the

¹⁵⁶ See note 79 *supra*.

¹⁵⁷ See, e.g., *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (independent injury requirement is designed to prevent inundation of the Supreme Court's original jurisdiction docket).

¹⁵⁸ In *Washington v. General Motors Corp.*, 406 U.S. 109 (1972) and *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), the Court denied state standing to enjoin large scale pollution of the state. The interests asserted by the states in these two cases, however, are the type the Court had traditionally allowed to satisfy its original jurisdiction requirements. See, e.g., *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (enjoinment of air pollution). Given the availability of alternative forums and the Court's denial of standing in *General Motors* and *City of Milwaukee*, it is unlikely that the Court would grant standing under its original jurisdiction if presented with facts like those in *Burch* or *NOW*.

¹⁵⁹ See, e.g., *Xerox Corp.*, [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,868 (F.T.C. 1975) (Defendant monopolized 60% of the office copier market in the U.S. Consent decree required mandatory, royalty free licensing of three patents to be selected by the licensee.); *United States v. United Shoe*

Antitrust Improvements Act to allow equitable parens patriae suits on behalf of small businesses regardless of an independent injury or an injury to a substantial number.¹⁶⁰

The rule that emerges from *Burch* and *NOW* is more liberal than the *Cook-Land O' Lakes* rule. To the extent that *Land O' Lakes* denied parens patriae standing in any suit which benefits private interests, the case is no longer valid precedent. A state's standing to include small businesses in equitable parens patriae actions will depend on the effects of the injury on the state's economy and the nature of the injunctive relief. Under *Burch* and *NOW*, the state will be denied standing only when it fails to show an independent injury and the relief sought involves a direct monetary benefit to the small business beneficiaries. Although this liberal standard allows small business inclusion in many equitable parens patriae cases, Congress should drop the independent injury/injury to a substantial number requirements. Congressional rejection of the requirements at the district court level will end the confusion caused by development of parens patriae in the context of the Supreme Court's original jurisdiction.

2. Parens patriae suits for treble damages

Small business inclusion in parens patriae suits for treble damages has not benefited from the liberalization of standing rules in suits for injunctive relief. The Antitrust Improvements Act,¹⁶¹ which governs parens patriae suits for treble damages, does not allow for small business inclusion. Rather, Congress

Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (Defendant, having monopolized 75-85% of the relevant product market, was ordered, *inter alia*, to provide nonexclusive licenses of patents at reasonable royalties.).

¹⁶⁰ The independent injury/injury to a substantial number requirements were rejected outright by the court in *In re Montgomery County Real Estate Antitrust Litigation*, 452 F. Supp. 54 (D. Md. 1978). The court's holding turned on the legislative history of the Antitrust Improvements Act. Congress felt injunctive relief was available in any suit where treble damages would be available under the Act. The state, in *Montgomery*, had standing to sue on behalf of natural persons as parens patriae for damages. Thus, the court felt it also had standing to sue on behalf of those same beneficiaries for injunctive relief, regardless of an injury to the general economy.

¹⁶¹ Pub. L. No. 94-435, §§ 301-304, 90 Stat. 1383 (1976) (codified at 15 U.S.C. §§ 15c-15h (1976), 28 U.S.C. § 1407(h) (1976)).

specifically excluded business firms from *parens patriae* damage suits.¹⁶² Congress felt that small business inclusion was unnecessary. Even if there was a need for small business inclusion, the problems it would entail outweighed its possible benefits.

Congress enacted Title III of the Antitrust Improvements Act of 1976¹⁶³ to overcome practical barriers faced by small individual and class treble damage litigants.¹⁶⁴ The Act authorizes a state attorney general to bring a *parens patriae* suit for treble damages on behalf of injured consumers within the attorney general's state.¹⁶⁵ These suits are limited to property injuries sustained by reason of a violation of the Sherman Act.¹⁶⁶ The Act contains various provisions designed to ensure that all parties involved are given their due process rights.¹⁶⁷ In addition, the Act contains language providing incentives for the state to

¹⁶² See notes 169-76 and accompanying text *infra*.

¹⁶³ Pub. L. No. 94-435, §§ 301-304, 90 Stat. 1383 (1976) (codified at 15 U.S.C. §§ 15c-15h (1976), 28 U.S.C. § 1407(h) (1976)).

¹⁶⁴ S. REP. NO. 803, 94th Cong., 2d Sess. 39-42 (1976); H.R. REP. NO. 499, *supra* note 109, at 6-8 (1975). The Ninth Circuit's opinion in *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973), also influenced the congressional action in 1976. H.R. REP. NO. 499, *supra* note 109, at 8. The court in *Frito-Lay* denied state standing to sue as *parens patriae* on behalf of individual citizens for treble damages.

¹⁶⁵ 15 U.S.C. § 15c(a)(1) (1976).

¹⁶⁶ *Id.* *Parens patriae* suits under the Act are not authorized for violations of § 3 of the Clayton Act, *id.* § 14, which forbids certain tying arrangements, § 7 of the Clayton Act, *id.* § 18, which forbids certain corporate mergers, the Wilson Tariff Act, *id.* §§ 8-11, which forbids restraints on import trade, or the Robinson-Patman Price Discrimination Act, *id.* §§ 13-13b, 21a, forbidding price discrimination.

¹⁶⁷ To protect the defendant from duplicative recovery, the Act excludes from the attorney general's suit any amount of monetary relief which has already been awarded for the same injury. *Id.* § 15c(a)(1)(A). The Act also attempts to insulate defendants from multiple liability. Any individual who fails to opt out of the suit, pursuant to subsection (b)(2), *id.* § 15c(b)(2), at the appropriate time will be bound *res judicata* by the *parens patriae* suit. *Id.* § 15c(b)(3).

The Act also includes numerous provisions designed to protect those individuals represented by the state. Any individual covered by the state's *parens patriae* action can file notice with the court excluding from the state's claim that portion of the recovery attributable to that individual. *Id.* § 15c(b)(2). Additionally, the Act requires the state to provide notice to beneficiaries of the suit by publication. *Id.* § 15c(b)(1). If, however, the court determines that notice by publication would deny any person's right to due process, the court can direct the state to furnish additional notice. *Id.*

bring parens patriae suits.¹⁶⁸

The Act, however, does nothing directly for small business. Small businesses do benefit indirectly from the deterrent effect of consumer parens patriae suits, as potential violators can harm both consumers and small business. But small business receives no direct benefit, as statutory authorization for parens patriae damage suits is limited to injuries sustained by natural persons.¹⁶⁹ Furthermore, the Act expressly excludes from a parens patriae suit any amount of recovery allocable to any business entity.¹⁷⁰ Finally, the provisions of the Act are limited to injuries to property.¹⁷¹ Under recent interpretations of the term property in the Clayton Act,¹⁷² this last provision further exemplifies a

¹⁶⁸ The Act allows the state attorney general to prove damages in the aggregate, in price-fixing cases, by statistical or sampling methods. *Id.* § 15d; see Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 679, 727-35 (1977); Comment, *Parens Patriae Antitrust Actions for Treble Damages*, 14 HARV. J. LEGIS. 328, 343-44 (1977). In approving the use of aggregate proof of damages, Congress specifically rejected the Second Circuit's concern in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974), that this method might be unconstitutional. H.R. REP. NO. 499, *supra* note 109, at 16.

In addition, the Act sets up a distribution procedure for the monetary relief secured by the state in a parens patriae suit. Under this procedure, the primary claimant of the state's monetary recovery is the injured consumer on whose behalf the suit was brought. 15 U.S.C. § 15e (1976). Any funds remaining after beneficiaries have made their claims may escheat to the state as a civil penalty, *id.* § 15e(2), or may be distributed through a court approved alternative scheme. *Id.* § 15e(1). See generally Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972); Note, *The Cy Pres Solution to the Damage Distribution Problems of Mass Class Actions*, 9 GA. L. REV. 893 (1975).

¹⁶⁹ The Act provides that "[a]ny attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of *natural persons* residing in such State . . ." 15 U.S.C. § 15c(a)(1) (1976) (emphasis added). The term natural persons is later defined in the Act as not including proprietorships or partnerships. *Id.* § 15g(3).

¹⁷⁰ The court in a parens patriae suit is directed to "exclude from the amount of monetary relief awarded in such action any amount of monetary relief . . . which is allocable to . . . any business entity." *Id.* § 15c(a)(1) (emphasis added).

¹⁷¹ *Id.*

¹⁷² In *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), the Supreme Court held that the terms "business" and "property" in § 4 of the Clayton Act refer to two distinct interests. The Court held an individual can be injured with respect to property even though not injured with respect to a business. In light of *Reiter*, it becomes clear that the reference to "property" in the Antitrust Improve-

congressional desire to limit *parens patriae* damage suits to consumers.

In limiting *parens patriae* suits to natural persons, Congress failed to analyze carefully three arguments raised in opposition to small business inclusion. Opponents of inclusion felt business entities did not need the *parens patriae* device,¹⁷³ that inclusion would overly complicate the litigation,¹⁷⁴ and would create *res judicata* problems.¹⁷⁵ Congress' cursory acceptance of these arguments resulted in a narrowing of the legislation to include only injuries to natural persons. Although the official committee report on the legislation acknowledged small businesses may not be able to bring their own treble damage actions,¹⁷⁶ the exclusion of all business entities remained in the legislation.

Careful analysis of the opponent's arguments indicates these arguments do not justify exclusion of small business from *parens patriae* suits. Opponents of inclusion argued that business entities are capable of maintaining their own litigation.¹⁷⁷ Thus, they felt there was no need to extend *parens patriae* beyond con-

ments Act is intended to be a limitation, and not merely shorthand for the "business or property" standard of § 4 of the Clayton Act.

¹⁷³ *Antitrust Improvements Act of 1975: Hearings on S. 1284 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (Part 1) 94 (1975) (statement of Thomas E. Kauper) [hereinafter cited as *Hearings on S. 1284*]; id. at 302 (statement of Milton Handler); id. at 375 (statement of Peter Max); *Antitrust Parens Patriae Amendments: Hearings on H.R. 38 and H.R. 2850 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 51 (1975) (testimony of David Klingsberg).**

¹⁷⁴ *Hearings on S. 1284, supra* note 173, at 94 (statement of Thomas E. Kauper); id. at 272 (statement of Andrew P. Miller).

¹⁷⁵ *Id.* at 320 (statement of Jerome G. Shapiro).

¹⁷⁶ The Committee's report stated:

The subcommittee . . . considered using the [term] "persons" . . . ; it concluded that "persons" was too broad a term as it might be construed to include business entities, which are able, in general, to fend for themselves. . . .

The committee chose "natural persons" as the best expression of the goals of the legislation. The term is intended to exclude business entities such as corporations, partnerships, and sole proprietorships. While some "natural persons" might be in a position to bring their own actions and some business entities might not, the committee concluded that these instances will be rare

H.R. REP. NO. 499, *supra* note 109, at 9.

¹⁷⁷ See note 173 *supra*.

sumer injuries to include business injuries.

This argument, however, fails to note the significant disparities between large and small businesses. Small businesses hold fewer of the available financial resources in the United States than large businesses, despite the former's greater number.¹⁷⁸ Small businesses receive a smaller return on each dollar of sales than large businesses.¹⁷⁹ In addition, large corporations have a greater ability to secure capital than small business.¹⁸⁰ Large corporations are also more capable of riding out periods of bad market conditions than small firms. Thus, while a large corporation with substantial net worth can usually maintain its own antitrust suits, the same cannot be said of small businesses.¹⁸¹

Failure to account for the differences between large corporations and small businesses has several important consequences.

¹⁷⁸ See, e.g., FTC statistics for the third quarter of 1979, which indicate that corporations with under \$10 million in assets in the manufacturing, mining, retail trade, and wholesale trade industries constitute 56% of the total number of firms in those industries. These same corporations, however, hold only 22% of the total assets for these four industries. FEDERAL TRADE COMM'N, Q. FINANCIAL REP. FOR MFG., MINING, AND TRADE CORPS. 17 (3rd Q. 1979) [hereinafter cited as Q. FINANCIAL REP.]. Businesses with assets over \$100 million make up only 10% of the companies in these four industries. They possess, however, 66% of the total assets. *Id.* The FTC's data base does not coincide exactly with the types of firms included in the definition of small business used in this comment. See note 2 *supra*. Yet the figures are indicative of the disparities between large and small companies.

¹⁷⁹ See Q. FINANCIAL REP., *supra* note 178, at 13. Manufacturing firms with less than \$5 million in total assets received a \$0.06 return on each dollar before taxes in the third quarter of 1979. Firms with more than \$1,000 million in total assets received a \$0.10 return on each dollar for the same period. *Id.*

¹⁸⁰ *Antitrust Enforcement (Part 2)*, *supra* note 65, at 465-66 (testimony of Arthur Burck).

¹⁸¹ A company's large size does not automatically enable it to engage in costly litigation. If a large company is in serious financial trouble, the benefit it receives from redress of antitrust wrongs may be so temporary that there is no justification for litigation. Under this comment's proposed inclusion of small business, see note 80 *supra*, this large company would be forced to absorb the cost of its injury. But any system of government conferred benefits involves some line drawing. *Cf. Harrison v. Schaffner*, 312 U.S. 579, 583 (1941) (approving legislative line drawing). When Congress originally drew the line at "natural persons" it failed to include a class of those who are usually unable to redress their injuries—small businesses. Relocation of that line as proposed in this comment will leave the failing corporation on its own. In the usual case, however, a large corporation will be able to maintain its own litigation and a small business will not. Thus, the line is drawn between the two.

An across the board elimination of companies from *parens patriae* suits results in small business' continued forced absorption of the costs of the violation and of potential litigation.¹⁸² This can result in the continuation of illegal conduct, decreased competition in the market, and increased prices.¹⁸³ Moreover, failure to include small businesses in *parens patriae* damage suits means small business litigants must continue to rely on individual and class actions. Thus, the gains in judicial economy,¹⁸⁴ achievable by *parens patriae*, are lost if small businesses are excluded from these suits.

Opponents of small business inclusion, however, argued that inclusion would not result in judicial economy; rather it would so complicate the litigation as to make it dysfunctional.¹⁸⁵ Opponents of inclusion contended that neither the federal courts¹⁸⁶ or the instituting attorney general¹⁸⁷ could handle the vast array of interests presented in this one suit. The potential for differing legal and factual issues and for additional complex issues was considered too great to justify small business inclusion.

¹⁸² See note 59 *supra*.

¹⁸³ See notes 65-71 and accompanying text *supra*.

¹⁸⁴ See note 196 and accompanying text *infra*; notes 208-10 and accompanying text *infra*.

¹⁸⁵ See *Antitrust Parens Patriae Amendments: Hearings on H.R. 12528 and H.R. 12921 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 93rd Cong., 2d Sess. 39 (1974)* (testimony of Thomas E. Kauper); *Hearings on S. 1284, supra* note 173, at 94 (statement of Thomas E. Kauper); *id.* at 272 (testimony of Andrew P. Miller).

¹⁸⁶ *Cf. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)* (price-fixing suits by indirect purchasers are too complex for efficacious litigation in federal court). Some commentators feel that *Illinois Brick* acts as a bar to most *parens patriae* suits. See *Hearings on S. 300, supra* note 62, at 13 (testimony of John Shenefield); Scher, *supra* note 168, at 726. While the effect of the *Illinois Brick* rule barring suits by indirect purchasers under § 4 of the Clayton Act, on *parens patriae* is unclear, *Illinois Brick* is not a bar to small business inclusion in *parens patriae* suits. Even if *Illinois Brick* bars *parens patriae* suits on behalf of indirect purchasers, states could sue as *parens patriae* on behalf of direct purchasers. Thus, assuming Congress authorizes small business inclusion, see note 80 *supra*, state's could sue for damages as *parens patriae* on behalf of direct purchaser small businesses.

Congressional efforts to overrule *Illinois Brick* may moot this direct/indirect purchaser problem. See S. REP. No. 239, 96th Cong., 1st Sess. (1979) (favorably reporting S. 300 which reverses the holding in *Illinois Brick*).

¹⁸⁷ *Hearings on S. 1284, supra* note 173, at 284 (testimony of Andrew P. Miller); *id.* at 320 (statement of Jerome G. Shapiro).

Parens patriae suits involving both natural persons and small businesses can be complex, but these arguments neglect the present ability of the federal courts to deal with complex litigation.¹⁸⁸ Early and effective judicial control of the litigation can help ease the case's burden on the court.¹⁸⁹ Consolidation of matters filed in different districts enables the district court judge to direct the case long before the court reaches the merits.¹⁹⁰ Moreover, the Antitrust Improvements Act permits consolidation for pre-trial and trial purposes, resulting in further efficiency.¹⁹¹ In addition, imposition of time limits,¹⁹² early focusing of legal issues,¹⁹³ and reduction of abusive discovery¹⁹⁴ all aid in the quick disposition of complex antitrust suits.¹⁹⁵

The underlying premise of small business inclusion is a desire to present as many interests in the litigation as possible before one court. This desire may increase the burden on that one court, but the correlative burden on the entire federal judicial system is reduced because the number of independent lawsuits resulting from the same injury would be decreased.¹⁹⁶ At the

¹⁸⁸ See generally Herndon & Higginbotham, *Complex Multidistrict Litigation—An Overview of 28 U.S.C.A. § 1407*, 31 BAYLOR L. REV. 33 (1979); Withrow & Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 CORNELL L. REV. 1 (1976).

¹⁸⁹ Withrow & Larm, *supra* note 188, at 5. The authors conclude that pre-trial procedures are much more important in controlling cases than trial procedures. They base this conclusion on the fact that very few antitrust actions reach the trial stage. See notes 47-48 and accompanying text *supra*.

¹⁹⁰ Transfer for consolidation by the Judicial Panel on Multidistrict Litigation is allowed when the panel finds that consolidation will be for the convenience of the parties and will promote just and efficient conduct. 28 U.S.C. § 1407(a) (1976). See generally Herndon & Higginbotham, *supra* note 188; Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575 (1978); Howard, *A Guide to Multidistrict Litigation*, 75 F.R.D. 577 (1977); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001 (1974). In addition, actions pending in one district may be consolidated under FED. R. CIV. P. 42(a) if there are common questions of law or fact.

¹⁹¹ 28 U.S.C. § 1407(h) (1976).

¹⁹² See NAT'L COMM'N REP., *supra* note 40, at 27-35.

¹⁹³ *Id.* at 59-72.

¹⁹⁴ *Id.* at 41-51.

¹⁹⁵ Withrow & Larm, *supra* note 188, at 9.

¹⁹⁶ In the year ending in June 1979, the Judicial Panel on Multidistrict Litigation transferred 936 actions from 87 different district courts to 20 transferee courts. DIRECTOR'S ANN. REP., *supra* note 27, at 86. In the Ninth Circuit, 198 cases were transferred into the various district courts, but 306 cases were

same time, the number of parties physically present before one court is potentially decreased by allowing the state attorney general to represent a wider group of interests. If the court effectively utilizes procedural tools designed for complex litigation, any burden created by small business inclusion can become manageable. The result can be a net gain in judicial economy.

The extent to which inclusion contributes to judicial economy also depends on the attorney general's ability to deal effectively with complex litigation. The burden on the attorney general will depend on the state's expertise in litigating complex antitrust suits.¹⁹⁷ If the case is too difficult, the attorney general can seek outside counsel to handle all or part of the *parens patriae* suit.¹⁹⁸ Cooperation between attorney generals from different states¹⁹⁹ and between state attorney generals and the Justice Department²⁰⁰ can also reduce the burden of litigation by providing for shared resource utilization.

Finally, aside from the judicial burden created by small business inclusion, opponents argued that inclusion could cause conflicts between small business and natural person beneficiaries which could prevent the *parens patriae* suit from acting as *res judicata*.²⁰¹ Opponents based their argument on the Supreme Court's holding in *Hansberry v. Lee*.²⁰² In *Hansberry*, the Court held that parties could not be bound by a prior determination in a class action if the representative in the earlier action had not adequately represented their interests.²⁰³ Since the interests of

transferred out. *Id.* at Table 44. It should be noted that of the 198 cases transferred in, 177 were in one district, the Western District of Washington. Thus, the remaining 14 districts in the Ninth Circuit received only 21 cases as transferee courts.

¹⁹⁷ See note 87 *supra*.

¹⁹⁸ 15 U.S.C. § 15g(1) (1976), defines the term "state attorney general" as including private counsel retained by the state, so long as the outside counsel receives a flat fee or a court approved contingent fee.

¹⁹⁹ See note 97 *supra*.

²⁰⁰ See notes 96 & 99 *supra*.

²⁰¹ *Hearings on S. 1284, supra* note 173, at 320 (statement of Jerome G. Shapiro).

²⁰² 311 U.S. 32 (1940).

²⁰³ In the earlier class action, *Burke v. Kleinman*, 277 Ill. App. 519 (1934), the parties stipulated that a condition precedent to the validity of a racially restrictive covenant had been satisfied. Enforcement of the covenant was contrary to the interests of some of the members represented by the plaintiff in *Burke*. These class members were attempting to avoid the *res judicata* claim in

the parties and the interests of the class representative in the earlier suit were in conflict, the Court felt the parties had not received adequate representation. Lack of adequate representation constituted a lack of due process, according to the Court.²⁰⁴ Opponents felt *Hansberry* applies to *parens patriae* suits, as the holding derives from due process notions apposite in any representative action.

This argument assumes that conflicts between small businesses and natural persons will be common and incapable of remedial action in a *parens patriae* suit. Although conflicts may occur, the degree of conflict will vary with the facts of each case. Procedural due process requires a court to make a case by case determination of the extent of conflict.²⁰⁵ Outright congressional rejection of small business inclusion in all cases fails to take account of this flexible standard.

Assuming Congress authorized small business inclusion in *parens patriae* damage suits, the trial court has the ability to determine the extent of conflict between the classes of beneficiaries. The court should not initially presume conflict exists in every case in which natural persons and small businesses are beneficiaries.²⁰⁶ Rather, the court should address the issue only upon an affirmative showing of conflict by a member of the class or the defendant. Once a party makes this showing, the court should engage in a balancing process to determine whether or not to allow the suit to continue.²⁰⁷ On the one hand, the court should consider the substantive and procedural goals sought to be achieved by the *parens patriae* suit and the court's own ability to accommodate conflicts. These interests should be balanced against the potential harm to the dissident class member or the defendant and the viability of possible alternatives to the *parens*

Hansberry.

²⁰⁴ 311 U.S. at 40-41.

²⁰⁵ *Cf. Mathews v. Eldridge*, 424 U.S. 319 (1976) (due process is not a technical concept with a fixed content unrelated to circumstances, but rather is flexible and calls for such procedural protections as the particular situation demands).

²⁰⁶ *See Developments in the Law-Class Actions*, 89 HARV. L. REV. 1318, 1475-77 (1976).

²⁰⁷ *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), where the Court held that in determining whether or not a particular process was constitutionally sufficient, a balancing between the governmental and private interests affected was necessary.

patriae litigation.

In this balancing process the court should give significant consideration to the role of *parens patriae* damage actions in antitrust enforcement. *Parens patriae* suits result in increased realization of substantive antitrust policies.²⁰⁸ These suits enable the court to adjudicate matters which would otherwise go undetected. In addition, the *parens patriae* suit serves a heuristic function.²⁰⁹ *Parens patriae* enhances the court's ability to perceive the scope of the violation and the array of parties affected by bringing a full range of interests before the court. Furthermore, *parens patriae* heightens the deterrent value of the treble damage action by increasing the likelihood that a suit will be brought. These factors, when considered along with the court's ability to accommodate conflict between rival beneficiaries,²¹⁰ should lead to a determination in most cases that the *parens patriae* suit can proceed.

If Congress carefully reconsidered the reasons for a natural person limitation in *parens patriae* treble damage suits, a different result would likely occur. The three arguments against business inclusion break down when subjected to close scrutiny. The significant differences between large and small businesses show that a uniform business exclusion is unjustified. Furthermore, the ability of courts to deal with complex issues and intra-class conflict undermines the view that small business inclusion should not be allowed in any case.

CONCLUSION

Small business inclusion in state *parens patriae* suits would bolster the role of these suits in antitrust enforcement. *Parens patriae* suits can overcome the practical barriers to institution of individual and class litigation by the injured small business. The

²⁰⁸ Cf. *Developments in the Law*, *supra* note 206, at 1352-72 (class actions result in increased realization of substantive policies).

²⁰⁹ Cf. *id.* at 1366-71 (class actions perform a heuristic function).

²¹⁰ To accommodate conflict between members of the beneficiary class of a *parens patriae* suit, the court could create subclasses, cf. FED. R. CIV. P. 23(c)(4)(B) (court has authority to divide a class into subclasses), require redefinition of the class, cf. FED. R. CIV. P. 23(c)(1) (court has discretion to issue orders regarding class maintenance), or encourage self exclusion by those with conflicting interests. *But see also* *Developments in the Law*, *supra* note 206 (advocating limited use of self exclusion in class actions).

result is a broadening of the scope of adjudication, in terms of the substantive violations detected and the range of interests presented, and a strengthening of the deterrent effect of the suit. To the extent these are desirable goals, small business inclusion should be adopted.

Under existing law, states can institute *parens patriae* suits for injunctive relief on behalf of small businesses. As recent cases indicate, so long as the state's suit is not brought to obtain a direct monetary benefit for the injured small businesses, and the state alleges an injury to its general economy, the state will have standing. While this standard allows for small business inclusion in many *parens patriae* suits, it is not a final solution to the dilemma faced by an injured small business. Thus, Congress should amend the Antitrust Improvements Act to allow for equitable *parens patriae* suits on behalf of small business.

Congress should also grant statutory authority for small business inclusion in *parens patriae* damage suits. Congress felt the natural person class of beneficiaries had the greatest need for state representation and that this representation involved fewer problems in terms of complexity and due process. Consideration of complexity and due process is necessary in structuring actual *parens patriae* litigation. Congress should not, however, let these issues block legislative efforts to include small business in *parens patriae* damage suits. Nor should Congress continue to operate under the false assumption that there is no need for reform in the small business area. So long as the courts retain active control of the litigation, *parens patriae* suits can provide significant benefits for both small business and society.

Kenneth W. Babcock